IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF OF

Kay Boyle, Peter De Vries, Mark Van Doren, Lucy Freeman, Herbert Gold, Dan Greenberg, Joseph Heller, Nat Hentoff, Christopher Isherwood, James Jones, Norman Mailer, Martin Mayer, Henry Miller, Philip Roth, Irwin Shaw, William Styron, Robert Penn Warren, Sloan Wilson, AUTHORS; Jack Gelber, Arthur Miller, Elmer Rice, PLAYWRIGHTS; Maxwell Geismar, Paul Goodman, Granville Hicks, Dwight Macdonald, Mark Schorer, CRITICS; Lawrence Ferlinghetti, Allen Ginsberg, John Crowe Ransom, Kenneth Rexroth, Karl Shapiro, May Swenson, Louis Untermeyer, Peter Viereck, POETS; Oscar Brand, Lenny Bruce, Les Crane, Bob Dylan, Sam Levene, Henry Morgan, ENTERTAINERS; Otto Preminger, Dore Schary, Herman Shumlin, Sanford Socolow, PRODUCERS/DIRECTORS; Ruth Adams (Managing Editor, Bulletin of the Atomic Scientists), Harry Benjamin, M.D. (Board of Consultants, Sexology Magazine, Laura Bergquist (Senior Editor, Look Magazine), William Jennings Bryan, Jr., M.D. (Editor-in-Chief, Journal of the American Institute of Hypnosis), Arthur A. Cohen (Editor-in-Chief, Holt, Rinehart & Winston, Inc.), Jason Epstein (Editor; Vice President in Charge of Modern Library, Random House, Inc.), Harry Golden (Editor; Publisher, The Carolina Israelite), Dr. John Greenway (Editor, Journal of American Folklore), Robert T. King (Editor, New York

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AS AMICI CURIAE

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

University Press), Paul Krassner (Editor and Publisher, The Realist), Eric Larrabee (Editor, Harper's Magazine), Martha MacGregor (Book Editor, New York Post), Kenneth McCormick (Vice President and Editor-in-Chief, Doubleday and Company, Inc.), Eric Moon (Editor, Library Journal), Philip Rahv (Editorial Board, Partisan Review), EDITORS; George Braziller (Publisher, George Braziller, Inc.), Edward M. Crane (Publisher and President, D. Van Nostrand Co., Inc.), Hugh Hefner (Publisher, Playboy Magazine), Robert Luce (Publisher, The New Republic), Ralph Ingersoll (Publisher, The Daily Journal, Elizabeth, New Jersey), Barney Rosset (Publisher, Grove Press, Inc. and Evergreen Review), PUBLISHERS; Martha Boaz (Librarian and Dean, School of Library Science, University of Southern California), R. B. Downs (Librarian and Dean, University of Illinois School of Library Science), Robert R. Knepper (Librarian, Los Angeles County Library System), William Purcell (Librarian, Wistar Institute, University of Pennsylvania), LIBRARIANS; Robert L. Caldwell (Senior Minister, East Whittier United Presbyterian Church, Whittier, California), William Glenesk (Senior Minister, Spencer Memorial Presbyterian Church, Brooklyn), Alan W. Miller, Ph.D. (Rabbi, Society for the Advancement of Judaism), Howard Moody (Minister, Judson Memorial Church, New York), CLERGYMEN; Laurence S. Baker, Ph.D. (Psychologist), Peter G. Bennett, M.D. (University of Pennsylvania School of Medicine and Psychiatry), Samuel Baron, Ph.D. (Psychoanalyst), Roger J. Callahan, Ph.D. (Psychologist), Dr. Prentice von Conrad (Chief Research Psychologist, Human Relations Research Fund), Wallace C. Ellerbroek, M.D. (Surgeon; Diplomate, American Board of Surgery; Fellow, American College of Surgeons), Sidney J. Fields, M.D. (Professor, University of Arkansas Medical School), Stanford Gamm, M.D. (Professor, Northwestern University School of Medicine), Dr. Eugene Gloye (Professor, Dept. of Psychology, Whittier College), Jesse H. Harvey, Ph.D. (Clinical Psychologist), Dr. Henry B. Hovey (Clinical Psychiatrist), Dr. E. Kronhausen (Psychologist and Author), Robert R. Matthews, M.D. (Dept. of Psychiatry, University of Arkansas Medical Center), Charles G. McCormick, Ed.D. (Clinical Psychologist), Eugene B. Nadler, M.D. (Professor, Dept. of Psychology, Case Institute of Technology), Dr. Henry Paar (Professor of Psychology, Director of Guidance and Psychological Services Program, Springfield College), W. G. Parsel, M.D. (Physician), Thomas E. Rardin, M.D. (Physician), Theodor Reik, Ph.D. (Psychologist, Author), Harold H. Saxton, M.D. (Physician), William M. Smith, M.D. (Chairman, Dept. of Psychology, Dartmouth College), Richard P. Walsh, Ph.D. (Coordinator, Counseling and Testing, Southern Illinois University), George J. Wittenstein, M.D. (Surgeon), PSYCHIATRISTS/PSYCHOLOGISTS/PHYSICIANS; Carlos R. Allen, Jr. (Professor of History, Colorado State University), Dr. Daniel M. Berman (Professor of Government, American University), Dr. E. Sculley Bradley (Professor of English, University of Pennsylvania), Dr. Crane Brinton (Chairman, Dept of History, Harvard University), Vern Countryman (Professor of Law, Harvard University; Former Dean, University of New Mexico School of Law), Dr. David Haber (Professor of Law, Rutgers University), Dr. Horst W. Janson (Chairman, Department of Art History, New York University), Lester A. Kirkendall (Professor, Oregon State College), Louis Lasagna, M.D. (Professor, Division of Clinical Pharmacology, Johns Hopkins University), McKim Marriott (Chairman, Dept. of Social Sciences, University of Chicago), Glenn C. Martin (Santa Monica City College), Tolbert H. McCarroll (President, American Humanist Association), Leonard Rowe (Lecturer, University of Cincinnati; Lecturer, Chase Law School), EDUCATORS; Alfred H. Barr, Jr. (museum director), Eliot Elisofon (photographer, Life Magazine), Lawrence K. Grossman (Vice President, National Broadcasting Company), August Heckscher (foundation executive), Rockwell Kent (artist; author), R. C. Murphy (Lamont Curator Emeritus, American Museum of Natural History), Bert Stern (photographer) and Brooking Tatum (anthropologist).*

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AS AMICI CURIAE

INTEREST OF AMICI CURIAE AND PRELIMINARY STATEMENT

Amici are more than one hundred publishers, editors, producers, directors, librarians, artists, writers, scholars, psychologists, psychiatrists, physicians, clergymen and others, alarmed that under our Constitutional system a person may be sentenced to prison for using the mails in the distribution of publications concerned with sex. Amici are dismayed that the august powers of the federal government, and of the federal judicial system, can be discharged to fine and jail an editor—publisher like Ralph Ginzburg, and to suppress from circulation and publication throughout the United States a magazine like *EROS*. If this Court fails to set aside such acts of punishment of a person and suppression of publications, we fear it will have severely constricted this country's parameters for permissible discussions of sex. If the judgments of the courts below are not reviewed and reversed, we fear this nation will go lame in the freedom of its sexual expression.

ARGUMENT

I.

EROS was (prior to its suppression as a result of the prosecutions below) a bold new magazine of importance. Its editor and publisher, Ralph Ginzburg, is the author of two books[1] and of articles appearing in such national magazines as *Harper's* and *Reader's Digest*.[2] He has been articles editor of *Esquire*.[3] Four

[1] *An Unhurried View of Erotica* (1958) and *100 Years of Lynchings* (1962).

[2] Harper's vol. XXII, January, 1962 at p. 790; Reader's Digest, vol. XXI, March, 1958 at p. 808. See also Coronet, vol. XIX, summer, 1953 at p. 975 and Theatre Arts, June, 1953. In addition, articles by Mr. Ginzburg are reported to have appeared in Collier's, Look, Outdoor Life, Esquire, This Week and Playboy magazines.

[3] Esquire, December, 1958 at p. 6.

issues[4] of *EROS* had been published, the fourth being the issue condemned below. Although largely concerned with sex, a cursory examination by the Court of that (or any other) issue of *EROS* will show this publication could never properly have been found worthless —"utterly without any redeeming social importance" or obscene. *Roth* v. *United States,* 354 U.S. 476; *Jacobellis* v. *Ohio,* 378 U.S. 184; *Grove Press, Inc.* v. *Gerstein,* 378 U.S. 577; Kalven, *Metaphysics of the Law of Obscenity,* 1960 Sup. Ct. Rev. 1. In the words of the *Saturday Review, EROS* was "a lavish production full of classical references and art and will likely become known as the *American Heritage* of the bedroom".[5] This Court's duty to undertake an independent examination of the claim to Constitutional protection of a work has often been recognized. *Jacobellis* v. *Ohio, supra* at 187-188; *Grove Press, Inc.* v. *Gerstein, supra; Tralins* v. *Gerstein,* 378 U.S. 576; *Manual Enterprises* v. *Day,* 370 U.S. 478, 488; *Roth*

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[4] Issues of *EROS* may be found at the Library of Congress.

[5] Saturday Review, Vol. XLV, No. 9, March 3, 1962 at p. 6. Counsel is advised that prior to its suppression, the magazine had received a number of arts and design awards, namely:

Citation of the American Society of Illustrators;

Six Awards of Distinctive Merit by Commercial Art magazine;

Gold Medal and Citations of the 1963 Annual Show of the Art Directors Club of New York; and

Award of Merit from the Art Directors Club of New Jersey.

Counsel is also advised that portions of *EROS,* including the remarkable photographic tone poem called "Black and White in Color", particularly condemned below, were scheduled for reproduction in the official United States State Department magazine, *America.*

v. *United States, supra,* at 497; *Times Film Corp.* v. *Chicago,* 355 U.S. 35; *Mounce* v. *United States,* 355 U.S. 180; *One, Inc.* v. *Olesen,* 355 U.S. 371; *Sunshine Book Co.* v. *Summerfield,* 355 U.S. 372; *Kingsley International Pictures* v. *Regents,* 360 U.S. 684, 707-708; *Smith* v. *California,* 361 U.S. 147, 169. Any need to exercise that duty in this case could well be dispensed with since, among other well qualified witnesses below, one of the nation's most perceptive critics of popular culture, Dwight Macdonald, testified to *EROS'* importance (JA 238-240). In any case where, at trial or with independent examination upon review, a work evidences some such importance, it is our understanding of the teaching of this Court that neither the freedom of the work nor the liberty of the work's publisher or distributor can properly be denied; the matter cannot Constitutionally be submitted to the "prurient interest" and "patently offensive" tests prescribed in *Roth* and *Manual Enterprises* for the regulation of the worthless and obscene.[6]

Any other application of *Roth* and *Manual Enterprises* places in obvious danger of destruction—not

[6] It is suggested that under *Roth,* in any criminal or other case involving a charge of *publicly* disseminating "obscene" literature, the prosecution ought to be charged with demonstrating (1) that the material has utterly no redeeming importance, failing which the case should be dismissed. Only after there has been a showing that the material involved is worthless should the issues be considered by the judge or jury whether (2) the material goes *substantially* beyond contemporary limits of candor and decency and (3) the matter's predominant appeal is to the prurient interest of average persons. In any case, where a defendant can show at the outset of the proceeding that the material challenged has some importance the case should be required forthwith to be dismissed. Otherwise, *the very instigation of such proceedings* operates to restrain distribution of literature having importance. See *Jacobellis* v. *Ohio, supra,* at 191.

only *EROS* and other material of like importance, but this nation's, even the world's, most important literature, science and art—in any case where these might find as their prime concern, sex, and the wheels of the machinery for criminal prosecution can be made to grind against persons publishing them.[7] It must have been, for it was stated to be, the design of *Roth* and cases which followed it, not to shut the door upon literary, artistic, scientific or any other method for discussing and exploring sex—"a subject of absorbing interest to mankind through the ages"—but rather to open it wide as possible short of "encroachment upon more important interests" such, it may be, as are essential to the maintenance of the public peace and basic social order.[8] It must, in any event, continue to be

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[7] Prosecutions for obscenity of the nation's literary vendors involve a broadspread censorship. Unwilling or unable to confine such prosecutions to works empty of artistic or instructive importance, state and federal officials have suppressed or punished the circulation of works expressing ideas having much, as well as small, artistic or instructive importance. (See de Grazia, *Obscenity and the Mail*, 20 Law & Contemp. 615 (1955); Ernst and Lindey, *The Censor Marches On* (1940); Lockhart & McClure, *Literature, The Law Of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, at 334-374 (1954)). The success of public prosecutors is many times magnified by extralegal work of national and local civic, religious and political groups, at times in cooperation with police and censorship "boards", often by use of extensive lists of "objectionable" authors and titles. (See *Bantom Books* v. *Sullivan*, 372 U.S. 58 (1963); Lockhart & McClure, *Literature, The Law of Obscenity, And The Constitution*, 38 Minn. L. Rev. 295, at 302-320; Larrabee, *The Cultural Context of Sex Censorship*, 20 Law & Contemp. 672 (1955)).

[8] As indicated in *Roth* and earlier cases, freedom for the expression of ideas having artistic or instructive importance is not absolute but may be excluded from the ambit of Constitutional protection if it encroaches upon the limited area of "more important interests". The representative cases noted in *Roth* at footnote 14 hold those "more important interests" are only such as justify

Roth's path, following *Jacobellis,* to eschew exposing literature or art having even the slightest claim to importance, to the ravages of the "average" person's ambivalence concerning sex.[9]

EROS discussed and explored sex in literary, artistic and scientific forms and manners. In doing this, it manifested considerable importance and cannot be counted obscene.

II.

The trial judge found "the only overriding theme of *EROS* to be the advocacy of complete sexual expression of whatever sort and manner" (JA 363). The court of appeals seems to have agreed. Were the accuracy of this description of the purpose of *EROS* conceded, it seems plain that this proposition argues to free the publication, not condemn it. As sex is rec-

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exclusion either: because the expression is used in such circumstances and is of such a nature as to create "a clear and present danger" that it will bring about a "substantive evil" which the state has a right to prevent (*Schenk* v. *United States,* 249 U.S. 47 (1919)); or because the state interest involved is important and is not directed at and does not infringe upon the content of the expression but rather upon the means whereby, (*Breard* v. *Alexandria,* 341 U.S. 642 (1951); *Teamsters Union* v. *Hanke,* 339 U.S. 470 (1950); *Kovacs* v. *Cooper,* 336 U.S. 77 (1949)) or place whereat, (*Cox* v. *New Hampshire,* 312 U.S. 569 (1941)) or conditions whereunder (*Prince* v. *Massachusetts,* 321 U.S. 158 (1944)) they may be expressed; or because a "balancing" of the contending interests persuades that the expression's must give way before the state's (*United States* v. *Harriss,* 347 U.S. 612 (1954)). The federal government's, like a state's, "interest" in purifying sexual thought or morality is non-existent. No power of this kind was bestowed on government by the Constitution which instead ordained that the individual's freedom in this area was inviolate. Thus, the incapacitations of state power with reference to speech, press and religion.

[9] See footnote 6, *supra.*

ognized by this Court to be "one of the vital problems of human interest and public concern" about which a protected circle of freedom of expression must be drawn, so must any journal advocating the abandonment of restraints with regard to sex be protected.[10] Thus, as it were, on the trial court's own admission, and the court of appeals concurrence, *EROS* is entitled to free expression.

III.

If the Court could not act under *Roth* to set aside the convictions on all counts below, and liberate *EROS* to the only Constitutionally valid arena for its trial—a "free and open encounter" in the American literary marketplace of ideas, where "all the winds of doctrine" can sift their strength, their purity, their artfulness, their righteousness—then *Roth* should be reconsidered. And if it be reconsidered, this should be to inquire whether the federal government has any "substantive power" to police sexual expression or morality in the mails[11] and whether the federal statute involved can be Constitutionally construed to reach

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[10] Such "advocacy" may be distinguished from "incitements" to sexual acts validly made criminal by statute—concerning which, it may be, the same rights of free expression would not exist. Consult "Text of Public Statement issued on May 28, 1962 based on Board of Directors action of April 16, 1962" contained in: "Obscenity and Censorship: Two Statements of the American Civil Liberties Union" (March, 1963).

[11] One may agree with Mr. Justice Harlan's protest in *Roth* that the federal government has "no business . . . to bar the sale of books because they might lead to any kind of 'thoughts'", without being able also to agree that a double-standard of freedom can be applied to publishers—depending upon whether it is a state or federal agency acting to police sexual thoughts and expression. The desirable prerogative of the state to experiment

any sexual literature or expression which is not disseminated in such a way as to constitute an actual incitement to crime.

Perhaps publishers and distributors of works like those involved in this case cannot have "carte blanche" to disseminate ideas under all circumstances and every condition. It may be that a statute could be designed and validly be directed against the dissemination of opinions, images or ideas under circumstances where it might have been known or predicated that sexual violence, criminal behavior, social disorder, or grave psychological injury would result.[12] Or under conditions of so cogent an idea, so artfully expressed, that a touch upon some extraordinarily sensitive fiber in the community's bundle of sexual nerves would threaten collapse of the bundle. It may be. But such

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with social controls must stop short of abridgements of individual Constitutional rights. And State and local censors must not be encouraged, as they will be, by strengthening the postal powers over expression. If freedom to read is a right protected by the First Amendment (*Smith* v. *California, supra,* at 153) it must be a right for all citizens and irrespective of the State in which they reside. The States must be forbidden from abridging this right, as they are forbidden uniformally from abridging their citizens' right to assemble or petition—by operation of the "privileges and immunities" clause, if not the "due process" clause of the Fourteenth Amendment. See Crosskey, *Politics and the Constitution,* Vol. II at 1094-5 (1953); Compare: Lockhart & McClure, *Censorship of Obscenity: The Developing Constitutional Standards,* 45 Minn. L. Rev. 19 (1960), note 28 at 110-114.

[12] In doing so, the state would doubtless need to consider the implications of such studies as Kinsey's *Sexual Behavior in the Human Male* (1948) and the *Report of the Committee on Forensic Psychiatry* of the Group for the Advancement of Psychiatry (No. 9, Rev. 1950) which, among other things, suggests that "absolute (sexual) law enforcement would perforce touch about 95% of the total male population." See also Kronhausen, *Pornography and the Law* (1959) at 155 ff.

conditions and circumstances have nothing in common with those summoned by this statute and this prosecution against petitioners here.

IV.

In addition to the specific issues of record in this case, addressed above, there may be a larger if largely undocumented question posed: May the federal postal obscenity powers Constitutionally be used to abort new publishing ventures, not by intercepting the mail, or by threatening or acting to impound, but by placing a publisher so far in fear of spending a good part of his remaining life in jail that he ceases publication.[13] This case demonstrates how enforcement of a criminal obscenity statute can serve to censor as effectively as any known method of prior restraint.[14] Since the incep-

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[13] Following his indictment and prosecution and cessation of his publication of EROS and *Liaison*, Mr. Ginzburg commenced publication of another periodical FACT.

[14] "Fear of punishment serves as a powerful restraint on publication, and fear of punishment often means, practically, fear of prosecution. For most men dread indictment and prosecution; the publicity alone terrifies, and to defend a criminal action is expensive. If the definition of obscenity had a limited and fairly well known scope, that fear might deter restricted sorts of publications only. But on account of the extremely vague judicial definition of the obscene, a person threatened with prosecution if he mails (or otherwise sends in interstate commerce) almost any book which deals in an unconventional, unorthodox, manner about sex, may well apprehend that, should the threat be carried out, he will be punished. As a result, each prosecutor becomes a literary censor (i.e., dictator) with immense unbridled power, a virtually uncontrolled discretion. A statute would be invalid which gave the Postmaster General the power, without reference to any standard, to close the mails to any publication he happened to dislike. Yet, a federal prosecutor, under the federal obscenity statute,

tion of the case against petitioner Ralph Ginzburg, there has been no *EROS*. This criminal prosecution sentenced that magazine to death. It is urged to be a Constitutional duty of this Court to set aside that death sentence.

> "Some few men stubbornly fight for the right to write or publish or distribute books which the great majority at the time consider loathsome. If we jail these few the community may appear to have suffered nothing. The appearance is deceptive. For the conviction and punishment of these few will terrify writers who are more sensitive, less eager for a fight."[15] Frank J. concurring in *United States* v. *Roth, supra*, Appendix at 825.

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approximates that position: Within wide limits, he can (on the advice of the Postmaster General or on no one's advice) exercise such a censorship by threat, without a trial, without any judicial supervision, capriciously and arbitrarily. Having no special qualifications for that task, nevertheless, he can, in large measure, determine at his will what those within his district may not read on sexual subjects. In that way, the statute brings about an actual prior restraint of free speech and free press which strikingly flouts the First Amendment." Frank, J., concurring in *United States* v. *Roth*, 237 F. 2d 796 (C.A. 2d, 1956)—Appendix at 820-822.

[15] "The (federal) prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous. He can have citizens investigated and, if he is that kind of person, he can have this done to the tune of public statements and veiled or unveiled intimations. Or the prosecutor may choose a more subtle course and simply have a citizen's friends interviewed. The prosecutor can order arrests, present cases to the grand jury in secret session, and on the basis of his one-sided presentation of the facts, can cause the citizen to be indicted and held for trial. He may dismiss the case before trial, in which case the defense never has a chance to be heard." Jackson, *The Federal Prosecutor*, 24 Jour. Am. Jud. Soc. (1940).

CONCLUSION

Since we believe the convictions below and the appellate action which sustained them to have been imposed in dereliction of Constitutional rights of free expression; and believe further that if those convictions are not set aside, the postal powers over expression will be strengthened and the powers of State and local censors everywhere will be encouraged; and since we believe finally that unless the sentences of fine and imprisonment imposed below are nullified, we will have only a diminutive freedom of expression in this country—and that there will result a general silencing of bold expression on sexual matters from authors, publishers and distributors who are not foolhardy enough to enter into *mock* combat with the average man's "prurient interest", when the latter's arms include a *real* possibility of heavy fines and imprisonment—believing all these things, we urgently ask this Court to grant the *writ of certiorari*.[16]

Respectfully submitted,

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[16] The writ seeks review of the judgments below affecting *The Housewife's Handbook on Selective Promiscuity* and *Liaison* as well as *EROS*.

The *Handbook* is a work, distributed by Petitioner, whose claim to importance (and thereby to Constitutional protection), upon independent review by this Court, may not be deniable. It appears to be a serious book, mostly about sex, evidently autobiographical, written by a woman who testified concerning the importance for her, and hopefully for others like her, of the ideas and attitudes toward sex and woman's sexual "rights", which got candidly expressed in her book. (J.A. 226-227). Evidence of the

Handbook's possible instructive importance for doctors and psychologists as well, was also presented below. (J.A. 216-217; 225-226, 262 and 289.) Under such circumstances, and regardless of the indifference or unimportance with which others may have regarded it, this book's circulation might seem to be entitled to full protection. For here, as elsewhere in the long struggle for freedom of expression, whether a work's ideas, its "message" are harkened to by a majority or a minority, found important by many or only a few—the ideas are, the "message" nonetheless would seem to be entitled to be tested under Constitutional conditions of freedom. To paraphrase John Stuart Mill, "If all mankind minus *Mrs. Serett* were of one opinion, and only *Mrs. Serett* were of the contrary opinion, mankind would be no more justified in silencing *Mrs. Serett* than *she*, if *she* had the power, would be justified in silencing mankind." (*On Liberty*). Compare Mrs. Mary Ware Dennett's *The Sex Side of Life*, held not obscene in a landmark case, *United States* v. *Dennett*, 39 F. 2d 564 (2d Cir., 1930); and Marie C. Stopes' books *Married Love* and *Contraception*, both ruled not obscene: *United States* v. *One Obscene Book Entitled "Married Love"*, 48 F. 2d 821 (S.D.N.Y., 1931); *United States* v. *One Book Entitled "Contraception"*, 51 F. 2d 525 (S.D.N.Y., 1931).

Liaison appears to be a kind of newsletter on sex, the first of whose issues was admitted by Petitioner's own witness to be "tasteless, vulgar and repulsive" (J.A. 237). There was, however, testimony by the same witness that succeeding issues avoided that fault and evidence by him, and from other sources, showing that the newsletter was "within the limits of sexual discussion that we see in other works and material that is freely circulated within the United States". (J.A. 237.) Equally important, the trial judge who concluded *Liaison* was obscene under the *Roth* and *Manual Enterprises* tests, also considered the issue in question to have advocated a sort of idea—namely, "the complete abandon of any restraint with regard to any form of sexual expression". (J.A. 362.) An independent examination by this Court of the magazine taken as a whole—so as to include other issues—might very well lead to a conclusion that the magazine was not "utterly without any redeeming social importance". See *Jacobellis* v. *Ohio, supra.*